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In the Supreme Court of the United States

DONALD J. TRUMP,
PRESIDENT OF THE UNITED STATES, *ET AL.*
Petitioners,

v.

INTERNATIONAL REFUGEE ASSISTANCE PROJECT, ET AL.,
Respondents.

DONALD J. TRUMP,
PRESIDENT OF THE UNITED STATES, *ET AL.*
Petitioners,

v.

HAWAII, ET AL.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FOURTH AND NINTH CIRCUITS

BRIEF OF *AMICI CURIAE* HARDWIRED GLOBAL; IRAQI CHRISTIANS ADVOCACY AND EMPOWERMENT INSTITUTE; CHINA AID; THE MANDAEAN HUMAN RIGHTS GROUP; YAZDA – A GLOBAL YAZIDI ORGANIZATION; GREGORY DOLIN; IRINA TSUKERMAN; AND KATHERINE LITVAK IN SUPPORT OF NEITHER PARTY

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are groups and individuals committed to upholding American ideals of providing refuge to those persecuted on the basis of religious beliefs.

Hardwired Global is a non–profit organization dedicated to promoting religious liberty and counteracting religion–based discrimination worldwide.

Iraqi Christians Advocacy and Empowerment Institute is a non–profit organization dedicated to ensuring safety and human dignity of Iraqi Christians and other minority groups both in Iraq and the global Diaspora.

China Aid is an international non–profit Christian human rights organization committed to promoting religious freedom and the rule of law in China as well as supporting Chinese Christians and their families who have experienced persecution at the hands of their government.

The Mandaean Human Rights Group is a non–profit organization that works with Sabian Mandaean community, an ethno–religious, linguistic minority and an indigenous people from Iraq and Iran.

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[1] No counsel for a party authored this brief in whole or in part and no party of counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No persons other than *amici* curiae or their counsel made a monetary contribution to its preparation or submission. The parties have all either filed blanket waivers with the Court or have explicitly consented to the filing of this brief.

Yazda – A Global Yazidi Organization is a non–profit multi-national Yazidi global organization established in the aftermath of the Yazidi Genocide in 2014, to support the Yazidi ethno-religious minority and other vulnerable groups.

Gregory Dolin, Irina Tsukerman, and Katherine Litvak are former refugees from the former Soviet Union who were beneficiaries of the Lautenberg Amendment, Pub. L. No. 101–167, § 599D, 103 Stat. 1195, 1265 (1989).

Amici have no direct stake in the outcome of the present litigation. *Amici* take no position on the various provisions of the President's Executive Orders on immigration on direct appeal. *Amici* have joined, however, to address a provision of those orders raised in some lower courts, and that may factor into the present litigation. *Amici* believe that it is entirely proper for the United States to extend preferential protection to persecuted adherents of minority religions. In this brief, *amici* explain that such preferences have been part of American refugee policy for decades, are fully supported by statutory language, do not offend the Establishment Clause, and have been an effective tool to combat religious persecution around the globe. *Amici* also highlight the likely detrimental consequences on persecuted religious communities if the Respondent's and certain other *amici's* arguments concerning the alleged incompatibility of religious preferences in refugee cases and the Establishment Clause are accepted.

INTRODUCTION

The United States has a long and proud history of sheltering those seeking refuge from oppression in their home countries.

> Since 1947 the United States has had a congressionally enacted immigration and naturalization policy which granted immigration preferences to 'displaced persons,' 'refugees,' or persons who fled certain areas of the world because of 'persecution or fear of persecution on account of race, religion, or political opinion.' Although the language through which Congress has implemented this policy since 1947 has changed slightly from time to time the basic policy has remained constant—to provide a haven for homeless refugees and to fulfill American responsibilities in connection with the International Refugee Organization of the United Nations.

Rosenberg v. Yee Chien Woo, 402 U.S. 49, 52 (1971).

In recognition and continuation of that history and tradition, in 1980, Congress passed, and the President signed, a comprehensive Refugee Act. Pub. L. No. 96–212, 96 Stat. 102 (1980). The Act (and predecessor legislation) permits the Executive Branch to extend asylum in the United States to those individuals who have suffered "persecution or [have] a well–founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." *Id.* § 201 (codified in 8 U.S.C. § 1101(a)(42)); *see also I.N.S. v. Stevic*, 467 U.S. 407, 414–421 (1984) (discussing refugee policy prior to 1980). Under the Act, only hardships resulting from

"persecution on account of race, religion, nationality, membership in a particular social group, or political opinion" serve as a basis for asylum. *Id.* Other hardships, no matter how severe, do not provide a basis for asylum. *See I.N.S. v. Elias–Zacarias*, 502 U.S. 478, 481–83 (1992). Thus, a person displaced from his home country as a result of war or natural disaster, though a "refugee" in the colloquial sense of the term, is not a "refugee" within the language of the Immigration and Nationality Act. *Id.* at 482.

On January 27, 2017, President Trump issued Executive Order No. 13,769 ("EO–1") which placed certain restrictions on the admission of refugees into the United States. Section 5(b) of that order directed "the Secretary of State, in consultation with the Secretary of Homeland Security ... to prioritize refugee claims made by individuals on the basis of religious–based persecution, provided that the religion of the individual is a minority religion in the individual's country of nationality." Exec. Order 13,769, "Protecting the Nation From Foreign Terrorist Entry Into the United States," §5(b), 82 Fed. Reg. 8,977, 8,979 (Jan. 27, 2017). Almost immediately, the States of Washington and Minnesota filed suit to enjoin § 5(b) and other provisions of that order arguing that the section violated the Establishment Clause of the United States Constitution. *See* Complaint, *Washington v. Trump*, No. 17–141 (W.D. Wash. Jan. 30, 2017), ECF, 1. The U.S. District Court for the Western District of Washington agreed with the Plaintiffs and granted an injunction, which the Ninth Circuit declined to stay. *Washington v. Trump*, 2017 WL 462040 (W.D. Wash., Feb. 3, 2017), stay denied by 847 F.3d 1151 (9th Cir. 2017).

As the litigation over EO–1 was pending, President Trump issued Executive Order No. 13,780 ("EO–2") which rescinded the original order and replaced it with similar, but somewhat modified directive. Exec. Order No. 13780, "Protecting the Nation from Foreign Terrorist Entry Into the United States," 82 Fed. Reg. 13209 (Mar. 6, 2017). Although EO–2 no longer directs the Secretaries of State and Homeland Security to "prioritize refugee claims made by individuals" belonging to minority religions in their home country, it clarified the reasons for EO–1 doing so. *See* EO–2, § 1(b)(iv). Given that statement, and given the separate statutory requirement that available refugee visas be "allocated among refugees of special humanitarian concern to the United States in accordance with a determination made by the President," 8 U.S.C. § 1157(a)(3), the question of whether the Government can preferentially grant asylum[2] to the adherents of minority religions remains live.

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[2] As a technical matter, a refugee and an asylee are not fully synonymous. A refugee is someone who applies for a refugee visa while outside of the United States, *see* 8 U.S.C. § 1101(a)(42), whereas an asylee is someone who applies while within the United States. *Id.* § 1158(a). However, because the standard for granting the application is the same in both cases, *see id.* § 1158(b)(1)(B)(i), in this brief, the terms are used interchangeably.

SUMMARY OF THE ARGUMENT

The United States has a long and proud history of offering asylum to those seeking refuge from religious persecution. This refuge is most often sought by those who belong to minority faiths in their native land. From the time of the Pilgrims and the Quakers, America has been a safe haven for adherents of minority religions.

That adherents of minority faiths are disproportionally likely to seek asylum is not a surprise. The ability to oppress rather than be oppressed is frequently correlated with the relative size of two populations. Because too many members of too many faiths insist that the Truth of their faith entitles them to oppress those who deny it, the combination of religious differences and minority status can serve as a pretext for brutality. The decades–long policy of the United States, as expressed in statutory language and executive actions, has thus been to give preferences in the processing of refugees to adherents of minority religious faiths.

Such an approach is necessary because the United States cannot admit every otherwise-qualified person seeking asylum. Sadly, in any given year, there are significantly more individuals in the world persecuted "on account of race, religion, nationality, membership in a particular social group, or political opinion," than can be admitted to the United States. As a result, the Government must select some rational basis for prioritizing the admission and rejection of otherwise qualified asylum seekers. Without denying the plight of any asylum seeker, it is entirely reasonable to conclude

that adherents of minority religions face graver dangers than do other refugees. Aligning United States policy with that recognition fulfills the Congressional command that asylum be extended to "refugees of special humanitarian concern to the United States," and is fully consistent with the Establishment Clause. A decision prohibiting the government from extending particular solicitude to the adherents of minority faiths would do more than substitute the Court's judgment for that of the political branches. It would result in exposing those most vulnerable to persecution to additional and unjustifiable risk of harm.

ARGUMENT

I. Asylum is Inextricably Entwined with Religious Practices.

Unlike most other government benefits, asylum is often granted because of the applicant's religious beliefs. Indeed, "religion is the *only* universal basis for asylum." Lance Hampton, *Step Away from the Altar, Joab: The Failure of Religious Asylum Claims in the United States in Light of the Primacy of Asylum Within Human Rights*, 12 Transnat'l L. & Contemp. Probs. 453, 462 (2002) (emphasis added). Religion–based asylum has been recognized from the earliest days of the American colonies. The Quakers and Mennonites settled in Pennsylvania after escaping persecution in their home countries. The Roman Catholics came to Maryland to avoid harassment in Great Britain. Jews fleeing the Inquisition sought haven in New York when it was still New Amsterdam. Though there was no formal "refugee" status or asylum procedure in the U.S. law until the middle of the 20th century, *see* Pub. L. No. 85–316, 71 Stat. 639

(1957),[3] the practice of admitting and preferencing immigrants fleeing religious persecution has a much longer pedigree.[4]

When Congress first defined "refugee," it explicitly conferred the status on people who fled their country of residence because of persecution on "account of race, *religion*, or political opinion." Pub. L. No. 85–316, § 15(c), 71 Stat. 639 (1957) (emphasis added). This definition, though somewhat broadened, remains the law today. *See* 8 U.S.C. § 1101(a)(42) (defining "refugee" as someone persecuted "on account of race, religion, nationality, membership in a particular social group, or political opinion.").

A. Adherents of Minority Faiths Are Most Vulnerable to Persecution

Throughout history, minority faiths have suffered ostracism or worse in repressive societies. It should, therefore, be uncontroversial to note that in countries

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[3] In 1950, Congress prohibited removal of aliens who would be subject to physical persecution, but did not grant these individuals any legal status, nor did it create a system for people outside of the United States to apply for similar protections. *See* Subversive Activities Control Act of 1950, § 23, 64 Stat. 1010 (1950). Similarly, the Immigration and Nationality Act of 1952, gave the Attorney General the authority to withhold deportation of people to places where they may be physically persecuted. Again, this provision did not confer a legal status on the beneficiary nor was it applicable to people outside of the United States. *See* Pub. L. No. 82–414, § 243(h), 66 Stat. 214 (1952).

[4] Admittedly, the commitment to the "historic policy of ... respond[ing] to the urgent needs of persons subject to persecution in their homelands," Pub. L. No. 96–212, § 101(a), 94 Stat. 102 (1980), has sometimes been honored more in the breach than in practice.

where people are persecuted "on account of race, religion, nationality, membership in a particular social group, or political opinion," minorities falling into one or more of those categories suffer the brunt of the maltreatment.[5] Although examples sadly abound, the *amici* wish to focus on two exemplars with which they have special familiarity and which provide an appropriate context for analyzing policies that favor minority religions over others in the context of immigration.

1. The Treatment of Jews and Other Religious Minorities in the USSR

The former Soviet Union was well known for being inhospitable to dissent in any form. Adherence to a faith or philosophy other than Communism was considered dissent. The Soviet government thus destroyed entire religious communities. *See* Lynn D. Wardle, *The "Withering Away" of Marriage: Some Lessons from the Bolshevik Family Law Reforms in Russia, 1917-1926*, 2 Geo. J.L. & Pub. Pol'y 469, 480 (2004). At best, the Soviets practied internal deportation to remove religious adherents from their usual places of abode. At worst, religious adherents were executed.

Although the USSR was formally atheist, traditional Russian Orthodoxy was tolerated and sometimes coopted, particularly after the beginning of

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[5] Occasionally, a minority group will seize or possess enough power and persecute the majority. Because such circumstances are the exception rather than the rule, it is appropriate for U.S. policy and law to address them on a case-by-case basis.

World War II.[6] *See* John Moroz Smith, *The Icon and the Tracts: A Restrained Renaissance of Religious Liberty in Ukraine*, 2001 B.Y.U. L. Rev. 815, 820 (2001). On the other hand, minority religions, including Ukrainian Catholic and Ukrainian Orthodox churches, were suppressed, their property confiscated, and their adherents jailed. *See* Alex Inkeles, *Social Change In Soviet Russia* 254–55 (1968) (noting that "[a]ll of the minority religions [had], of course, been the object of repressive measures.").

Most notorious, perhaps, was the Soviet treatment of Jewish citizens. Some forms of discrimination were legally codified, while others were practiced as a result of secret Communist Party edicts. For example, ritual circumcision—a rite practiced by the Jewish community for millennia—was forbidden. Saturday school attendance was compulsory despite the conflict with the Jewish Sabbath. *See* Joseph Kulesa, *Paradise Lost: The Impact of the Changed Country Conditions in Post-Soviet Ukraine on Pending Religious Asylum Proceedings in the United States*, 6 Rutgers J. L. & Religion 6, n.74 (2004). Religious rites were virtually impossible to perform. On Yom Kippur—the holiest day in the Jewish calendar—the militia and plain-clothed KGB officers often erected roadblocks and detained people on the way to their synagogues. *See* Documents on

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[6] Indeed, many of the Soviet-era officials in the recognized Russian Orthodox Church have long been thought to be officers in the KGB. *See* Keith Armes, *Chekists in Cassocks: The Orthodox Church and the KGB*, 1 Demckratizatsiya 72 (1991), *available at* https://www2.gwu.edu/~ieresgwu/assets/docs/demokratizatsiya%20archive/01-04_armes.pdf.

Ukrainian–Jewish Identity and Emigration, 1944–1990, 200–01 (Vladimir Khanin, ed. 2002). Because of the official hostility to Judaism, many cities with sizable Jewish populations went years (or decades) without any ordained rabbis to minister to the Jewish community. *See* Amy Louise Kazmin, *Soviet Jews Study Their Lost Religion*, L.A. Times at A14 (Sept. 14, 1989). Institutions of higher learning had "unspoken" and "unofficial" but very real quotas for the admission of Jewish students, and certain universities and jobs were all but closed to Soviet Jews. *See* Richard S. Levy, Antisemitism: A Historical Encyclopedia of Prejudice and Persecution (vol. 1) 725 (2005). With World War II having a central role in the historiography of the USSR, the Soviet government promoted the myth that Jews did not serve in combat units and instead "lay low on the home front." *See* Zvi Gitelman, *Why They Fought: What Soviet Jewish Soldiers Saw and How It is Remembered* at 4, 20–21 (Nat'l Council for Eurasian and E. European Research, 2011), *available at* https://www.ucis.pitt.edu/nceeer/2011_824-03g_Gitelman.pdf.

Although the Soviet government at various times undertook campaigns against other minorities (*e.g.*, Chechens and Crimean Tatars), the division of the country into ethnically–based constituent Republics and autonomous regions allowed most ethnic minorities to constitute a majority in a part of the country where such overt discrimination against them became harder, if not altogether impossible. Jews were among the few minorities lacking an enclave within the USSR where they constituted a majority (others included Evangelical Christians, Ukrainian Catholics, and Ukrainian Orthodox).

Discrimination against them was therefore nationwide.[7] *See* 135 Cong. Rec. H3734 (July 13, 1989) (statement of Rep. Lipinski).[8]

2. The Treatment of Religious Minorities in Some Middle Eastern Countries

Because portions of the challenged Executive Order relate exclusively to Muslim–majority countries in the Middle East and North Africa, the conditions under which that region's minority faiths labor should be discussed. The Department of State and various NGOs agree that minority faiths are heavily discriminated against in that part of the world.

For example, according to a Department of State report on Syria, "[t]he Alawite–led government and its Shia militia allies killed, arrested, and physically abused Sunnis and members of targeted religious

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[7] Although in 1928, the Soviet government established the Jewish Autonomous District around the Far East city of Birobidzhan, at no point did the Jewish population of the "Jewish Autonomous District" exceed 17% of the region's total population. This is because the district was intentionally established in a region that was geographically remote from any Jewish population centers.

[8] As a result of continued discrimination of minority faiths in present day Russia, *see, e.g.*, Amanda Erickson, *Russia just effectively banned Jehovah's Witnesses from the country*, WashingtonPost.com, 2017 WLNR 12246791 (Apr. 20, 2017); Jewish Telegraphic Agency, *Russian Prosecutors Raid Second Jewish Educational Institution* (June 15, 2015), *available at* http://www.jta.org/2015/06/15/news-opinion/world/russian-prosecutors-raid-second-jewish-educational-institution-2, the U.S. government has continued to extend preferential treatment to adherents of certain minority faiths in Russia. *See* Part II.A, *post*.

minority groups, and intentionally destroyed their property." U.S. Dep't of State, *Syria 2015 International Religious Freedom Report* at 5 (2016). Although the government of Syria continues to tolerate Christians, non–state actors such as ISIS[9] have "tortured and beat [Christians in a village near Aleppo] before crucifying them." *See id.* at 10. The minority Druze community has suffered a similar fate. *Id.* The victims have been targeted solely for their faith. *Id.* The small Jewish communities of Aleppo and Damascus have likely ceased to exist. *Id.* at 2–3. ISIS has also committed atrocities against Shiites, allegedly in retaliation for "the government's 'massacres of Sunnis.'" *Id.* at 9. However, unlike the Christian, Jewish, or Druze population of Syria, the Shia who are threatened by ISIS are at least somewhat able "to relocate to traditional [government] strongholds." *Id.* at 14. It is only the powerless minority religions who can find no refuge anywhere in Syria.

The plight of minority religions in Yemen is also deplorable. For example, the small Jewish community has endured "continued harassment ... by the local population, including [] throwing stones and coercion to convert to Islam. Jewish students reportedly continued to stay away from public schools due to social pressures and security concerns." U.S. Dep't of State, *Yemen 2015 International Religious Freedom Report* at 6 (2016). The "concerns over

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[9] Islamic State in Iraq and Syria (ISIS) is also known as Islamic State in Iraq and Levant (ISIL) or by its name in Arabic, al–Dawla al–Islamiya fi al–Iraq wa al–Sham, abbreviated as Daesh. It is the latter name that the State Department uses in its reports.

security and the children's future" has prompted "members of the Jewish community [to] depart[] Yemen" and become displaced persons. *Id.* Christians in Yemen have seen their spiritual leaders flee and their churches burned. *Id.* Members of the Bahai faith have been arrested, tortured, and held without charges for indefinite periods. *Id.* at 1, 3–4. All of these groups, together, comprise less than 1% of the Yemeni population, and have nowhere within Yemen to seek protection. *Id.* at 2.

Iraq is a home to a number of minority religious communities, and is also a place where some of the worst atrocities against the adherents to minority faiths is taking place. As the United Nations Office of High Commissioner for Human Rights reports, ISIS fighters have conducted mass executions of Yazidi men and teenage boys, while forcing women and children to watch. U.N. Office of High Comm'r for Human Rights, *"They Came to Destroy": ISIS Crimes against the Yazidis* at 8–9, A/HRC/32/CRP.2 (2016). The survivors were forcibly converted to Islam. *Id.* at 9. Women and girls between the ages of nine and sixty have been sold into sexual slavery, *id.* at 9–16, while women over the age sixty have been summarily executed. *Id.* at 11. Young children have been routinely beaten, molested, and, in case of males, conscripted to fight as child soldiers. *Id.* at 16–19. ISIS has attempted to destroy the entire Yazidi culture through the destruction of temples and shrines, *id.* at 19, and forcibly transferring the Yazidi population out of their ancestral homes. *Id.* These horrors have been visited on the Yazidi community solely because they are Yazidi. The Sunni Arabs of the region have not been subjected to the same treatment at the hands of ISIS. *See, e.g.*, *id.* at 30 ("No

other religious group present in ISIS-controlled areas of Syria and Iraq has been subjected to the destruction that the Yazidis have suffered. Arab villagers who did not flee Sinjar in advance of the ISIS attack were allowed to remain in their homes, and were not captured, killed, or enslaved.").

Nor are the Yazidis the only minority faith that is facing virtual annihilation in Iraq. For example, Iraqi Mandaeans[10] who until recently numbered between 60,000 and 70,000 are now "facing extinction" as a result of religion–based attacks by ISIS. *See* Angus Crawford, *Iraq's Mandaeans "Face Extinction,"* BBC (March 4, 2007), available at http://news.bbc.co.uk/1/hi/world/middle_east/6412453.stm. In Iraqi regions overrun by ISIS, Christians were given "a choice: They could either convert or pay the *jizya*, the head tax levied against all 'People of the Book': Christians, Zoroastrians and Jews. If they refused, they would be killed, raped or enslaved, their wealth taken as spoils of war." Eliza Griswold, *Is This the End of Christianity in the Middle East?*, N.Y. Times Magazine at 31 (July 22, 2015).

Unlike Syria, Yemen and Iraq, Iran is not in the midst of a civil war. Yet the mistreatment of religious minorities in Iran is both common and well documented. The Iranian government has repeatedly confiscated non–Islamic religious texts, including Bibles. U.S. Dep't of State, *Iran 2015 International*

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[10] Mandaeans are adherents of Mandaeism, a Gnostic religion that developed in t e first three centuries of the Common Era. *See generally* Kurt Rudolph, Madaeism (Brill, 1978).

Religious Freedom Report at 13–15 (2016). In 2015, "Christians, particularly evangelicals and converts, continued to experience disproportionate levels of arrests and high levels of harassment and surveillance," and are required to register with the police and are prohibited from holding services on any day other than Sunday. *Id.* at 13. The Bahai community is particularly hard–hit. They "are banned from government employment and from all leadership positions in the military. They are not allowed to participate in the governmental social pension system. Bahais cannot receive compensation for injury or crimes committed against them and cannot inherit property." *Id.* at 6. The Bahais are often prosecuted on trumped–up charges, they cannot assemble, be employed in a number of professions, or bury their dead in accordance with their customs. *Id.* at 9–10, 15, 18–19. Numbering less than one–half of one percent of the population, the Bahai have no ability to protect themselves in Iran. Indeed, "[a]ccording to law, Bahai blood may be spilled with impunity, and Bahai families are not entitled to restitution," whereas "[t]he law authorizes collection of 'blood money' as restitution to families for the death of Muslims." *Id.* at 2, 7.

Other Middle Eastern states, especially those where ISIS is active, also present peculiar and heightened dangers to individuals professing a minority faith (*i.e.*, Christianity, Bahai, Judaism, disfavored sects of Islam, and others). Adherents to minority religions within the region face a significantly higher risk of violence and death from both government and non–government actors than do followers of the majority religion. *See* Griswold, *End of Christianity*, *supra*.

B. Proving Individualized Persecution on the Basis of Religion is Often Quite Hard, Even for Members of Minority Religions

While discrimination against members of minority faiths *writ large* is a common occurrence in certain regions, it does not mean that every adherent of that faith is personally persecuted.

Some Soviet Jews succeeded despite the obstacles the government placed in their way. There were Jewish doctors, lawyers, musicians, chess champions, etc. *See* 118 Cong. Rec. 12,941 (Apr. 17, 1972) (statement of Rep. Halpern).

In Saddam Hussein's Iraq, Deputy Prime Minister Tariq Aziz was a Chaldean Christian, notwithstanding the regime's heavy anti-Christian discrimination—including the ethnic cleansing of several towns during the Anfal campaign of 1988. Iran reserves at least three parliamentary seats for Christians, notwithstanding the Iranian government's harassment of Christian churches and the limitations it places their ability to function. *Iran 2015 Report*, *supra* at 5.

In Syria, though the Assad regime has abused and discriminated against Sunni Muslims, many Sunnis support the regime in large part because of the success they have achieved as individuals. *See* Michael Pizzi & Nuha Shabaan, *Sunnis Fill Rebel Ranks, but Also Prop Up Assad Regime*, USAToday.com (Aug. 1, 2013).[11]

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[11] This sort of alliance between individual Sunnis and an anti–Sunni regime reiterates one of the differences between a targeted minority faith and a targeted majority. A minority

Though evidence of life under ISIS remains sketchy, it is likely that at least some non–Sunnis escape individualized discrimination. After all, even Nazi Germany could point to a Field Marshal with a Jewish parent—Erhard Milch.[12] *See* Obituaries, *Erhard Milch, 79, Luftwaffe Chief*, N.Y. Times at 32 (Jan. 29, 1972).

Discrimination against a group thus need not translate into discrimination against every member of that group. Asylum seekers hoping to avail themselves of American protection, however, must show that they have personally "suffered past persecution or ... ha[ve] a well–founded fear of future persecution ... on account of race, religion, nationality, membership in a particular social group, or political opinion" as an individual. 8 C.F.R. § 208.13(b); *Li Sheng Wu v. Holder*, 737 F.3d 829, 832 (1st Cir.2013); *Lolong v. Gonzales*, 484 F.3d 1173, 1178 (9th Cir. 2007); *Harchenko v. I.N.S.*, 379 F.3d 405, 410 (6th Cir. 2004). The burden of proving this fear rests with the applicant. 8 C.F.R. § 208.13(a); *I.N.S. v. Cardoza–Fonseca*, 480 U.S. 421, 456 (1987).

In many circumstances then, applicants are unable to show individualized "past persecution." *Cf.*

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regime seeking to govern a country where another group constitutes a significant numeric majority must find many allies among its majority citizens. Such alliances are far less imperative for a majority group dominating a minority.

[12] The legal machinations that permitted Milch to escape the fate of other Jews and to climb the highest rungs of German military command caused Hermann Goering to famously quip "I decide who is a Jew." Reuters, *Historian: Jewish Officers Fought For Nazis*, Chicago Trib. at 14 (Apr. 3, 1997).

Nagoulko v. I.N.S., 333 F.3d 1012, 1017 (9th Cir. 2003) (finding that witnessing the beating of co–workers is insufficient to establish past persecution); *Zhou Ji Ni v. Holder*, 635 F.3d 1014, 1018 (7th Cir. 2011) ("[A]n asylum applicant cannot rely on "derivative persecution" to establish that he was subjected to persecution in the past.").

The "well–founded fear of future persecution" would be equally difficult to prove if each applicant were required to show that he *personally* received threats of harm "because, 'an authentic refugee is often limited in his ability to offer direct corroboration of specific incidents of persecution.'" *Shah v. I.N.S.*, 220 F.3d 1062, 1070 (9th Cir. 2000) (quoting *Mejia–Paiz v. I.N.S.*, 111 F.3d 720, 722 n. 1 (9th Cir.1997)); *see also Ahmadshah v. Ashcroft*, 396 F.3d 917, 920–21 (8th Cir. 2005). For this reason, regulations implementing the Congressionally–created system for admitting refugees permits an applicant to carry the burden by showing that he or she belongs to a group of persons against whom "there is a pattern or practice ... of persecution ... on account of race, religion, nationality, membership in a particular social group, or political opinion" in the applicant's home country. 8 C.F.R. 208.13(b)(2)(iii). In other words, when it comes to discrimination on the basis of religion, showing that the applicant is an adherent of a persecuted faith may suffice to qualify for asylum.

II. Preferences For Persecuted Religious Minorities Have Long Been Part of the U.S. Law

Congress, the Executive Branch, and the courts have long realized that in many instances it will be nearly impossible for an asylum seeker to prove

individualized persecution. As a result, Congress has, on numerous occasions, exhibited particularized concern for individuals in certain social groups by providing them with an eased path towards asylum. The earliest example of such solicitude is the Cuban Adjustment Act of 1966, passed in the wake of Communist takeover of Cuba. Pub. L. No. 89–732, 80 Stat. 1161 (codified as amended at 8 U.S.C. § 1255 (2017)). The revolution caused a number of Cubans to go into exile. "In order to enhance the resettlement of refugees, Congress passed the Cuban Adjustment Act of 1966, providing for employment and education, opportunities not generally accorded other refugee groups." Nicholas Merlin, *Immigration Policy and the Expedited Removal Rule: "Equality for Some, Justice for None"*, 16 St. Thomas L. Rev. 163, 165 (2003). Recognizing the brutality that Communist dictators often visited upon opponents (or even suspected opponents) of the regime, Congress resolved to provide preferential treatment to Cuban exiles, without extending the same to asylum seekers from other parts of the world. *See* Note, *The Cuban Adjustment Act of 1966: ¿Mirando Por Los Ojos De Don Quijote O Sancho Panza?*, 114 Harv. L. Rev. 902, 910 (2001). The courts have uniformly rejected the numerous challenges to that Act. *See* Merlin, *supra*, at 165; 177–80.

More recently, Congress has created special privileges for additional groups. *See, e.g.*, Immigration Act of 1990, Pub. L. No. 101–649, § 303 (granting Temporary Protected Status to citizens of El Salvador). Of particular relevance to the present case is Congress' action in 1989, when it enacted what became known as the "Lautenberg Amendment."

Pub. L. No. 101–167, § 599D, 103 Stat. 1195, 1265 (1989).

A. The Lautenberg Amendment is a Strong Precedent for Extending Preferential Treatment to Minority Religions

In the late 1980s, with the loosening of emigration rules in the Soviet Union, the number of Soviet citizens (especially Jewish ones) seeking asylum in the United States rose quickly. H. Rep. No. 101–122, at 3–4 (1989). Unsurprisingly, the number of cases lacking material proof of individualized past or future persecution witnessed a corresponding increase. Victor Rosenberg, *Refugee Status for Soviet Jewish Immigrants to the United States*, 19 Touro L. Rev. 419, 426–28 (2003). Some American officials argued that a large portion of the Soviet Jewish émigrés were not "'refugees,' but '[ ] rather, prospective immigrants, and as such, they should enter this country according to the requirements of our own immigration laws.'" *Id.* at 427 (quoting written testimony of Immigration and Nationalization Service Commissioner Alan Nelson).

As a result, the percentage of Soviet Jewish applicants denied refugee status grew from barely 1% to a high of 37%. H. Rep. No. 101–122, at 5. At the same time, the discriminatory policies of the Soviet government, *see* Part I.A.1, *ante*, continued. H. Rep. No. 101–122, at 3.

Congress responded to this dilemma by passing legislation giving preferential treatment to Soviet citizens belonging to several minority religions. Pub. L. No. 101–167, § 599D, 103 Stat. 1265. The Lautenberg Amendment (named after its chief sponsor, Sen. Frank Lautenberg) lowered the burden

of proof required to obtain asylum for Soviet Jews, Evangelical Christians, Ukrainian Catholics, and Ukrainian Orthodox. *Id.* Followers of these minority religions no longer had to prove a "well–founded fear of persecution," but merely to "assert[ ] such a fear and assert[] a credible basis for concern about the possibility of such persecution." *Id.* § 599D(b)(2)(A–B). Other Soviet citizens did not receive the same preferential status.[13]

The legislative history of this provision explains why Congress felt it necessary to treat adherents of some religions differently from others. For instance, presaging the passage of the Amendment, a majority of U.S. Senators urged the Administration to classify "all Soviet Jews as refugees," because of "the history of anti–Semitism in Russia and the Soviet Union." Rosenberg, *supra* at 432. The House Judiciary Committee report accompanying one of the bills that eventually became the Lautenberg Amendment noted that although "[t]he Soviet state has always maintained a hostile stance toward religion," including the Russian Orthodoxy, "Soviet Jews and Evangelicals" were subject to particular hardships. H. Rep. 101–122, at 5. At the same time, the report recognized that the "United States does not have the capacity to accept all Soviet citizens who wish to emigrate...." *Id.* Given the limited capacity, the Committee believed that groups subject to particular hardships should be prioritized. *Id.* Recognizing the tenuous status of Soviet reforms and the precarious

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[13] The Lautenberg Amendment also offered the same status to certain categories of the citizens Vietnam, Laos, and Cambodia. Pub. L. No. 101–167, § 599D(b)(2)(C).

position of the minority religions, Congress ultimately passed the Act, though it acknowledged that there had been "tremendous improvement in terms of religious practices in the Jewish community as well as Jewish emigration patterns; [and] in terms of Baptists and Evangelicals being allowed to establish their own seminary and publish their own literature," as well other religious practices. *See* 135 Cong. Rec. H3735 (July 13, 1989)(statement of Rep. Henry). In doing so, Congress explicitly rejected the argument raised by the opponents of the bill that the approach violates the "fundamental principle of treating all immigrants equally." *Id.* (statement of Rep. Smith).

In keeping with the original purpose of aiding particularly vulnerable religious minorities, the Lautenberg Amendment's coverage has expanded since it was passed. In 2004, Congress extended it to include religious minorities in Iran. Pub. L. No. 108–199, § 213(1)(C), 118 Stat. 3, 253 (2004).

B. The Executive Branch is Statutorily Required to and has been Prioritizing Certain Groups of Potential Refugees for Decades

Even though, unlike the Lautenberg Amendment, Section 5(c) of the EO–1 was not enacted by Congress, it stands on equally strong footing. As an initial matter, INA § 207(a)(3) directs the President to allocate the admission slots "among refugees of special humanitarian concern to the United States." 8 U.S.C. § 1157(a)(3). This direction necessarily means that while there may be individuals who are eligible for refugee status, they may not receive a visa because they are not of "*special* humanitarian concern."

The Department of Homeland Security has followed that Congressional direction by establishing three separate priority tiers for the admission of refugees. The first order priority is reserved for individualized cases and is available for "persons ... with compelling protection needs, for whom resettlement appears to be the appropriate durable solution." U.S. Dep't of State, *Proposed Refugee Admissions for Fiscal Year 2017*, at 7 (2016) ("FY 2017 Admissions"). The second order priority is given to a particular group of people based on "whether the group is of special humanitarian concern to the United States and whether individual members of the group will likely be able to qualify for admission as refugees under U.S. law." *Id.* at 8. As required by INA § 207(d) and 8 U.S.C. § 1157(d), these designations are updated on a yearly basis. *Id.* at 1. Furthermore, new "[g]roups may be designated as Priority 2 during the course of the year as circumstances dictate, and the need for resettlement arises." *Id.* at 8. Currently, this category includes, *inter alia*, beneficiaries of the Lautenberg Amendment with close family in the United States, members of persecuted religious minorities from Cuba and Iran, certain categories of ethnic minorities from Burma, Bhutanese living in Nepal, and Congolese living in Rwanda. *Id.* at 9–11.[14] The designation of other religious minorities for priority treatment is consistent with the requirements of INA § 207 and historical practice of the Executive Branch.

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[14] The third priority tier is reserved for "to members of designated nationalities who have immediate family members in the United States who initially entered as refugees or were granted asylum." FY 2017 Admissions, *supra*, at 12. Currently, 22 nationalities are eligible for this tier. *Id.* at 14.

III. Preferencing Adherents of Particular Religions in the Context of the Refugee Program Does Not Constitute Invidious Discrimination Against Other Religions

The Respondents have argued that giving preference in refugee admissions to the adherents of minority religions impermissibly "tilt[s] the scales in favor of Christian refugees at the expense of Muslims." Motion for TRO, at 12, *Washington v. Trump*, No. 17–141 (W.D. Wash. Jan. 30, 2017), ECF, 3. According to the Respondents, this violates the Establishment Clause because "one religious denomination cannot be officially preferred over another." *Id.* at 11 (quoting *Larson v. Valente*, 456 U.S. 228, 244 (1982)). Such an approach is contrary to history and inconsistent with the principles underlying longstanding American refugee policy.

The United States refugee policy is based on several principles. First, individuals are eligible for asylum only if they are persecuted "on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1101(a)(42). Though other individuals may be in dire straits because of war or natural disasters in their home country, as a matter of law they do not qualify for the refugee status.[15]

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[15] Individuals who experience threats to personal safety as a result of an armed conflict or natural disaster may be eligible to obtain Temporary Protected Person status ("TPS"). *See* 8 U.S.C. § 244. Currently, 10 countries are designated for TPS: El Salvador, Haiti, Honduras, Nepal, Nicaragua, Somalia, Sudan, South Sudan, Syria, and Yemen. *See* https://www.uscis.gov/humanitarian/temporary-protected-status.

The second principle recognizes that the United States cannot admit all those who would otherwise qualify for asylum. Congress has thus required the President to set an annual limit on the number of refugee admissions. 8 U.S.C. § 1157(a)(2). That limit is consistently set far below the number of people who could potentially qualify for refugee status. For example, the current conflict in Syria alone has produced over 6 million displaced persons.[16] Undoubtedly, many of these individuals fled Syria because of the dangers of war, rather than persecution "on account of race, religion, nationality, membership in a particular social group, or political opinion." Nonetheless, even if only 5% of the total number fled because of persecution, that number of individuals would be nearly three times the entire Fiscal Year 2017 refugee limit.[17] *See* FY 2017 Admission, *supra* at 5.

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[16] According to the U.N. High Commissioner for Refugees, "there are at least 10 million people worldwide who are not recognized as nationals of any state and are therefore stateless." FY 2017 Admissions, *supra*, at 2. Because of their status, these individuals are deprived of basic civil rights including ability to "access police protection and systems of justice." *Id.* Many of these individuals could qualify for asylum in the US, *id.*; however, the United States cannot possibly admit all of these individuals.

[17] The FY 2017 limit itself is the highest annual limit in over 20 years, *see* Department of State, Office of Admissions—Refugee Processing Center, Refugee Admissions by Region Fiscal Year 1975 through 30-Jun-2017, *available at* http://www.wrapsnet.org/s/Graph-Refugee-Admissions-since-19757317.xls.

The third principle follows directly from the second. Recognizing that the United States cannot absorb all of the world's refugees, Congress has directed the President to allocate the admission slots "among refugees of *special* humanitarian concern to the United States." 8 U.S.C. § 1157(a)(3)(emphasis added). Something is special only when it is "[d]istinguished by some unusual quality." Webster's Third New International Dictionary of the English Language 2186 (3d ed.1961) (1986 rptg.); *see also 1756, Inc. v. Attorney General*, 745 F.Supp. 9, 14 (D.D.C. 1990) ("An item is special only in the sense that it is not ordinary..."); *United States v. Vasquez*, 279 F.3d 77, 81 (1st Cir. 2002)(recognizing that "special" is a synonym of "unusual or atypical."). All persecuted individuals in the world certainly deserve sympathy and, where possible, help. But not every such individual is of "special" or "unusual" humanitarian concern to the United States. A construction that established a single level of concern applicable to all persecuted persons would impermissibly "rob the term '[special'] of its independent and ordinary significance," *Reiter v. Sonotone Corp.*, 442 U.S. 330, 338–39 (1979). Because courts "are obliged to give effect, if possible, to every word Congress used," *Carcieri v. Salazar*, 555 U.S. 379, 391 (2009) (quoting *id.* at 339), such a construction would be erroneous.

These three principles, which together form the basis of U.S. refugee policy, emphasize the need to choose whom to admit. Because choosing people who are particularly vulnerable to persecution because of their status as a religious minority is consistent with America's core principles and history, it has been

American policy for decades. President Trump's Executive Orders simply continue and reiterate that policy.

Respondent's complaint that Section 5(b), which operates worldwide, *see* EO–2, § 1(b)(iv), favors Christians "at the expense of Muslims" makes sense only if the majority of the world's refugees arrive fleeing Muslim-majority countries.[18] As a matter of simple math, the principle of favoring targeted minority faiths can work against Muslims only if Muslims are responsible for the majority of the discriminatory targeting.

The logic driving Respondents' argument is thus disturbing on two points. First, Respondents simply presume the disproportionate culpability of Muslims in creating the world's refugees. Second, Respondents argue that the Establishment Clause prohibits American immigration policy from preferencing people facing discrimination *if and only if* the discrimination is rooted in religion. We share neither Respondents' dismal opinion of Muslims nor their

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[18] While Muslims from the Middle East may be disadvantaged, Muslims fleeing most countries in Europe, East Asia, Sub–Saharan Africa, or the Americas would be preferenced. *See* EO–2, § 1(b)(iv). Furthermore, § 5(b) does not preclude the recognition that there are different strains within Islam and that, for example, Iranian Sunni Muslims or Saudi Arabian Shia Muslims, each being a minority within their respective countries, may benefit from preferences for minority religions. *Id.* Furthermore, even if EO–1's § 5(b) were limited to the Middle East, and even if it treated Islam as a uniform whole, the Respondents are incorrect in their assertion that the minority preference provision benefits only Christians. The Bahai, Yazidis, Jews, and other minority faiths would reap the same benefits.

inverted reading of the First Amendment. *Cf. Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2021 (2017) ("Free Exercise Clause did guard against the government's imposition of 'special disabilities on the basis of religious views or religious status.'" (quoting *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872,877 (1990)).

Furthermore, Respondents have not differentiated between the preferences at play here and those in the Lautenberg Amendment, special policies that give preferences to Cuban refugees, or any other group that currently receives preferences in refugee processing. Preferences do not automatically incorporate invidious discrimination. Rather, they indicate an American government offering refuge to the people it has determined need it most (without disregarding the very real suffering of others). Because adherents of minority faiths are least likely (at least among those claiming persecution on the basis of religion) to be in a position to protect themselves, prioritizing their applications over others is not only entirely consistent with the Constitution, the statutory language, and historical practice, it is indeed the *only* way to allocate the available refugee slots on the basis of relative need. The only alternative would be some form of lottery among those who qualify for asylum, thus giving everyone an equal chance at a refugee visa. Such a luck-based approach would ignore the Congressional edict that "[a]dmissions [of refugees] shall be allocated among refugees of special humanitarian concern to the

United States." 8 U.S.C. § 1157(a)(3).[19] In addition, Congress explicitly rejected such an approach during the debates leading to the Lautenberg Amendment. *See* Part II.A, *ante*.

Finally, while it is true that not *every* adherent of a minority faith *always* has higher risk of persecution *than every* follower of a majority religion, and therefore preferences to the former group may well be over–inclusive, Congress is not required to create a perfect system for prioritizing immigration applications. *See United States v. Flores–Villar*, 536 F.3d 990, 996 (9th Cir. 2008), aff'd, 564 U.S. 210 (2011) and abrogated on other grounds by *Sessions v. Morales–Santana*, 137 S. Ct. 1678 (2017) (holding that "in light of the virtually plenary power that Congress has to legislate in the area of immigration

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[19] It is ironic that in the days immediately following President Trump's issuance of EO–1, numerous press reports drew upon the experience of the *MS St. Louis*. The 900 passengers on that ship were Jews fleeing Nazi Germany in 1939—shortly before the outbreak of the second World War. Because of immigration quotas then in place, the U.S. rejected their petitions for admission, and returned them all to Europe. Nearly all contemporary commentators view FDR's decision in this matter as a tragic error—almost certainly employing hindsight bias about the genocide awaiting their return. Yet under the standard that Respondents urge, the passengers of the St. Louis would have qualified merely as German citizens complaining about the regime then running their country—not Jews fleeing an imminent campaign of extermination. https://www.theatlantic.com/politics/archive/2017/01/jewish-refugees-in-the-us/514742/.
https://www.washingtonpost.com/news/post-nation/wp/2017/01/29/a-ship-full-of-refugees-fleeing-the-nazis-once-begged-the-u-s-for-entry-they-were-turned-back/?utm_term=.5dd72530bfa6 .

and citizenship" its classifications survive judicial review even when "the fit is not perfect.").

It is well settled that "in the exercise of its broad power over immigration and naturalization, 'Congress regularly makes rules that would be unacceptable if applied to citizens.'" *Fiallo v. Bell*, 430 U.S. 787, 792 (1977) (quoting *Mathews v. Diaz*, 426 U.S. 67, 80 (1976)). Courts "uphold[] immigration statutes so long as they are 'conceivably related to the achievement of a federal interest.'" *Bangura v. Hansen*, 434 F.3d 487, 495 (6th Cir. 2006) (quoting *Almario v. Attorney General*, 872 F.2d 147, 152 (6th Cir.1989)). Thus, although in a given year, preferencing adherents of minority religions may come "at the expense of Muslims," "[t]hose are ... the consequences of the congressional decision not to accord preferential status to this particular class of aliens," a "decision [that] remains ... 'solely for the responsibility of the Congress and wholly outside the power of this Court to control.'" *Fiallo*, 430 U.S. at 788–89 (quoting *Harisiades v. Shaughnessy*, 342 U.S. 580, 597 (1952) (Frankfurter, J., concurring)).

Congress gave the President the authority to designate particular groups as being of "special humanitarian concern" to the United States. 8 U.S.C. § 1157(a)(3). Bestowing this status on adherents of minority faiths is both reasonable and consistent with long-standing practices. The Court should not stray from precedent. The Court should allow the political branches to determine which groups are most in need of American protection. Indeed, the Appellants can cite no case from any court holding that religion-based preferences in any immigration context violate the Establishment Clause.

IV. Holding that Religious Preferences in the Context of the Refugee Program Violate the Establishment Clause Will Result in Further Endangering the Most Vulnerable Groups

A decision holding that the Constitution prohibits preferencing adherents of minority religions in the asylum context would be worse than merely contrary to this Court's own precedents and decades of Congressional and Executive Branch practice. It would further endanger the very individuals most in need of American protection.

It does not diminish the plight of millions of displaced persons throughout the world to acknowledge that the adherents of minority religious faiths often have nowhere to go in their home countries. In the Middle East, most Sunni and Shia Muslims can find at least some semblance of protection in certain parts of their home countries. Adherents of minority faiths often cannot.[20] Whereas Syria, Iraq, and numerous other countries in the Middle East and North Africa have both majority–Sunni and majority–Shia areas and cities, the region's many other faiths have no such sanctuaries. Jews have been all–but–eliminated from every country in the region, and consolidated into Israel. Christian majority areas exist only in Lebanon, and to a far smaller extent, Egypt. The Bahai, Yazidis, and numerous smaller religions are majorities nowhere. *See* Part I.A.2, *ante*.

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[20] In some cases, if internal relocation is feasible, the applicant may be denied asylum. *See* 8 C.F.R. § 208.13(b)(1)(i)(b).

The sad but fundamental truth is that the United States cannot accept every refugee seeking admission and cannot save every person in need of saving. Hard and heart–wrenching choices need to be made. Everyone appears to be in agreement that, given a ceiling on the number of refugee admissions, the process is in essence a "zero–sum game," in which the grant of asylum to one person means someone else eligible for the same status will not get it. By calling into question preferential treatment for the adherents of minority faiths, all the Court will do is substitute its own choices for those of Congress and the Executive Branch. Withdrawing these preferences will not allow more people to enter the United States. It will simply redistribute the probability of admission from some people and groups to others.

Worse still, though the *availability* of asylum is a "zero–sum game," the *effect* of it is not. For instance: granting a refugee visa to someone who is not persecuted denies that slot to someone who *is* persecuted. The number of refugees admitted does not change, but admitting an unqualified person condemns the qualified one whose slot was given away to continued privations and possibly even death at the hands of his oppressors. This outcome would undermine "the historic policy of the United States to respond to the urgent needs of persons subject to persecution in their homelands," Pub. L. No. 96–102, § 101(a). Far from creating an ideal world where neither of these two hypothetical individuals is oppressed (one because he was never persecuted and the other because he received asylum), it would create a world where the persecuted individuals remain persecuted. The Constitution cannot possibly compel such an outcome.

Such a hypothetical misallocation of an asylum slot to a fully unqualified applicant is, concededly, a straw man. *Amici* do not dispute that many members of majority faiths in refugee camps qualify for asylum. Nonetheless, some qualified people face graver danger than others merely because of who they are or how they worship. The United States should remain free to recognize the different levels of danger, and prioritize the extension of its protection to those it has determined are most vulnerable. Denying the Government the opportunity to preferentially protect those who are the least likely to obtain protection in their home countries solely because of how they commune with their Creator would greatly increase the risk of harm to these individuals. The Court should not consign them to this unenviable fate.

CONCLUSION

Individuals forced to flee their countries and seek asylum in an unknown land are some of the most vulnerable people in the world. Regrettably, the United States cannot accept every refugee in the world (nor can any other country). Because there are significantly more refugees in the world than can be admitted to the United States, the U.S. Government must decide which qualified individuals to admit. Some of the people seeking refuge in this country are particularly susceptible to, and defenseless in the face of, persecution and discrimination in their countries of origin. Members of religious minorities fall into that group far too often.

In determining the validity of the President's Executive Orders, the Court should be careful to avoid making it more difficult for the United States to protect religious minorities, lest it make the world even more inhospitable to those who are already most vulnerable.

Respectfully submitted,

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